87-1547

No. .....



# In the Supreme Court
OF THE
# United States

OCTOBER TERM 1987

CALIFORNIA TEAMSTERS PUBLIC, PROFESSIONAL AND MEDICAL EMPLOYEES UNION LOCAL 911, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
*Petitioner,*

VS.

ABRAHAM GHEBRESELASSIE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT D. VOGEL, ESQ.,
A Member Of
WOHLNER, KAPLON, PHILLIPS,
VOGEL, SHELLEY & YOUNG
A Professional Corporation
1545 Wilshire Boulevard
Suite 211
P.O. Box 17925
Los Angeles, California 90017
Telephone: (213) 484-2005

*Attorneys for Petitioner California Teamsters Public, Professional and Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

## QUESTION PRESENTED

Does an employee possess standing to vacate/confirm an arbitration award contrary to the position of his exclusive collective bargaining representative in the absence of a finding of unfair representation?

## LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were petitioner California Teamsters Public, Professional and Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 911")[1], respondent Abraham Ghebreselassie ("Ghebreselassie"), Coleman Security Service, Ronald Farwell, Herman Hendricks and Parking Concepts, Inc. ("employer").

---

[1]Although Local 911 was a defendant and counter-claimant in the district court proceedings, it was not a party on appeal until it was granted intervenor status by the Court of Appeals to address one (1) of the issues Ghebreselassie raised on appeal: whether the district court properly vacated an arbitration award rendered on May 17, 1985.

## TABLE OF CONTENTS

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## Table of Authorities

### Cases



### Statutes

No. .....

# In the Supreme Court

OF THE

# United States

OCTOBER TERM 1987

CALIFORNIA TEAMSTERS PUBLIC, PROFESSIONAL AND MEDICAL EMPLOYEES UNION LOCAL 911, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

*Petitioner,*

VS.

ABRAHAM GHEBRESELASSIE,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Local 911 respectfully prays that a Writ of Certiorari issue to review the opinion of the Court of Appeals for the Ninth Circuit rendered in this case on October 7, 1987.

## OPINIONS BELOW

Respondent Ghebreselassie commenced litigation in relevant part against his employer for wrongful termination and Local 911 for breach of the duty of fair representation emanating from an adverse arbitration decision which sustained his termination from employment.

At about the same time, Local 911 filed a timely counter-claim against Ghebreselassie's employer to vacate the arbitration award.

On June 5, 1986, after Local 911 had moved to vacate the arbitration award, the district court ordered the arbitration award vacated. (App. A, pp. A-1 - A-2.)[2]

Thereafter, the employer and other defendants in the case successfully moved for summary judgment on Ghebreselassie's complaint.

Thereafter, Ghebreselassie appealed the lower court's orders vacating the arbitration award and granting summary judgment to the employer and other defendants.

During the pendency of his appeal, Ghebreselassie's unfair representation claim against Local 911 remained pending in the district court.

On October 7, 1987, the Ninth Circuit reversed the district court's order vacating the arbitration award and concluded Ghebreselassie possessed standing to seek its judicial confirmation.[3] (App. B, p. A-8.) The Ninth Circuit's opinion is reported as *Ghebreselassie v. Coleman Sec. Service*, 829 F.2d 892 (9th Cir. 1987).

On October 26, 1987, Local 911 filed with the Ninth Circuit a Petition for Rehearing and Suggestion for Rehearing *En Banc*.

On December 14, 1987, the Ninth Circuit denied Local 911's Petition for Rehearing and rejected its Suggestion for Rehearing *En Banc*.

---

[2]References in this petition to "App." refer to the Appendices attached hereto.

[3]Both in the district court and the Ninth Circuit, the employer did not oppose Local 911's contention the arbitration award should be vacated.

## JURISDICTION

The initial decision of the Ninth Circuit was filed on October 7, 1987. On December 14, 1987, the Ninth Circuit denied Local 911's Petition for Rehearing and Suggestion for Rehearing *En Banc*. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) for review by a writ of certiorari.

## STATUTES INVOLVED

This case indirectly involves Section 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), which provides:

> "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, . . . may be brought in any district court of the United States having jurisdiction of the parties . . ."

## STATEMENT OF THE CASE

At all times relevant, Ghebreselassie was employed by the employer as a parking lot cashier at an airport parking lot. During his employment, he was a member of Local 911 and his terms and conditions of employment were governed by a collective bargaining agreement ("contract") entered into by Local 911 and the employer.

Following an internal investigation, Ghebreselassie was terminated for alleged ticket manipulation. Thereafter, Local 911 filed and processed a grievance on his behalf with the employer which proceeded to arbitration in accordance with the contract.

The arbitrator concluded Ghebreselassie was discharged without just cause but declined to reinstate him

because the grievance had not been timely filed by Local 911. (App. B, pp. A-4 - A-5.)

At the commencement of the arbitration hearing, Local 911 and the employer stipulated the arbitrator was to decide two (2) questions: whether Ghebreselassie had been discharged for just cause, and, if not, what relief he was entitled to. (App. B, pp. A-8 - A-9.)

After the arbitration decision was announced, Ghebreselassie commenced litigation against Local 911 alleging it breached the duty of fair representation in the handling of his grievance which resulted in the adverse arbitration decision.

At approximately the same time, Local 911 filed a counter-claim against the employer (who Ghebreselassie was also suing for wrongful termination) seeking to vacate the arbitration award contending the arbitrator acted improperly in deciding an issue (procedural arbitrability) the contracting parties had not submitted to him for decision.

Later, Local 911 moved the district court to vacate the arbitration award on this basis. The employer joined in the motion and Ghebreselassie opposed it.

On June 5, 1986, the district court granted Local 911's motion . . . because "the issue of timeliness was not properly before the Arbitrator because it was outside the scope of the submission agreement." (App. A, p. A-2.)

Ghebreselassie appealed the district court's order vacating the arbitration award. The Ninth Circuit later reversed, concluding Ghebreselassie possessed standing to seek the judicial confirmation of the arbitration award contrary to Local 911's position and the lower court erred in vacating it because "the arbitrator's decision to deny relief [to Ghebreselassie] rests directly on his construction of the parties' submission agreement and on his

interpretation of the collective bargaining agreement." (App. B, p. A-7.)

## REASONS FOR GRANTING THE WRIT

### I.

### THE NINTH CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION OF FEDERAL LABOR LAW WHICH SHOULD BE DECIDED BY THIS COURT: WHETHER AN EMPLOYEE, CONTRARY TO THE POSITION OF HIS EXCLUSIVE COLLECTIVE BARGAINING REPRESENTATIVE, POSSESSES STANDING TO VACATE/CONFIRM AN ARBITRATION AWARD IN THE ABSENCE OF A FINDING OF UNFAIR REPRESENTATION

The Ninth Circuit, as noted above, declared an employee who is not a party to a contract or the arbitration process has standing to vacate/confirm an arbitration award contrary to the position of his exclusive collective bargaining representative if he merely *alleges* the union breached the duty of fair representation in representing/failing to represent him in the grievance proceeding culminating in the arbitration decision.

In doing so, the Ninth Circuit has taken a quantum leap forward from the recognized proposition an employee can avoid the adverse binding effect of an arbitration decision *by successfully proving* the union breached the duty of fair representation.

By stating the mere allegation rather than *substantiation* of a breach of the duty of fair representation will cloak an employee with the power to directly vacate/confirm an adverse arbitration decision, the Ninth Circuit's opinion will, if not remedied, undermine the union's ability to function efficiently as the exclusive collective bargaining representative of all the employees it represents.

Where the responsibility for processing disputes under a contract is vested exclusively in the union, as it is in this case with Local 911, an employee must rely upon the union to represent his interests and properly exhaust the contractual remedies on his behalf.

In such situations, the employee is ordinarily bound by the resulting final and binding arbitration decision *unless* he thereafter successfully *demonstrates* the union breached the duty of fair representation in representing him in the contractual process which culminated in and proximately caused the adverse arbitration result. If he does so, his success in litigating the duty of fair representation claim has the same effect as the union successfully vacating the arbitration award on his behalf. *See United Parcel Service v. Mitchell,* 451 U.S. 56, 58 n. 3 (1981).

And if the adverse arbitration decision is the product of the union's unfair representation, the decision is not a bar to the employee successfully suing his employer for breaching the contract in terminating him.

The general recognized proposition is that a final and binding arbitration award which draws its essence from the contract bars an aggrieved employee from subsequently thereafter successfully suing his employer for breaching the contract in terminating him unless the employeee can first demonstrate the union breached the duty of fair representation in representing him in the arbitration proceeding.

In this case, both Local 911 and the employer agreed the arbitration award rendered did not draw its essence from the contract and, as a result, the contractual propriety of Ghebreselassie's termination should be referred back to the final and binding contractual process where it rightfully belongs pending the completion of a new arbitration proceeding.

By declaring the mere *allegation* rather than the successful *demonstration* of unfair representation cloaks an employee with independent standing to vacate/confirm an arbitration award, the Ninth Circuit has seriously eroded the finality effect that has been and must be given to such awards to avoid destroying an employer's confidence in the union's authority to assume full responsibility for representing its members.

## II.

## THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS RENDERED BY OTHER CIRCUITS WHICH HAVE HELD AN EMPLOYEE DOES NOT INDEPENDENTLY POSSESS STANDING TO VACATE/CONFIRM AN ARBITRATION AWARD

The Ninth Circuit's opinion in this case represents the first appellate court decision announcing an employee possesses standing to independently and directly vacate/confirm an arbitration award contrary to the good faith position of his exclusive collective bargaining representative.

Its conclusion an employee independently possesses standing to directly seek the vacation/confirmation of an arbitration award in the absence of a judicial finding of unfair representation conflicts with opinions rendered by the Fifth and Seventh Circuits on the subject.

In *Acuff v. United Paperworkers and Paperworkers,* 404 F.2d 169 (5th Cir. 1968), *cert. den.,* 394 U.S. 987 (1969), the Fifth Circuit declared employees lack standing to vacate an arbitration award when they are not parties to the arbitration because "[i]t would be paradoxical in the extreme if the union, which is authorized to decide whether a grievance is to be pursued to the arbitration

stage at all, could not be authorized to assume full responsibility for a grievance it did pursue, without the intervention of the individual members immediately concerned." *Id.* at 171.

And in *W.F. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781,* 629 F.2d 1204, 1211 (5th Cir. 1980), *cert. den. sub. nom. W.F. Woolworth Co. v. Fell,* 451 U.S. 937 (1981), the Seventh Circuit, citing *Acuff* and *Andrus v. Convoy Co.,* 480 F.2d 604, 606 (9th Cir.), *cert. den.,* 414 U.S. 989 (1973),[4] commented that "[t]he decisional authority governing the rights of individual union members to participate in the process of dispute resolution after arbitration suggests that individual members may not bring suit in an attempt to have the award set aside. *See Andus, supra.* Nor may they intervene in an ongoing action in order to vacate an award, particularly in opposition to the union. *See Acuff, supra.*"

In this case, Ghebreselassie, in direct flagrant opposition to his exclusive collective bargaining representative, sought to confirm the arbitration award. Although he can and has sued Local 911 for breach of duty of fair representation and avoid the finality of the adverse arbitration decision if he eventually prevails on that claim, "[w]hen a

---

[4]Although *Andrus,* cited by the Ninth Circuit below (App. B, p. A-8), agrees with the Fifth Circuit that employees cannot attack an arbitration award " 'except on the grounds of fraud, deceit or breach of the duty of fair representation or unless the grievance procedure was a 'sham, substantially inadequate or substantially unavailable' ' ", this dictum has been construed by other courts to only mean an employee may avoid the finality of an adverse arbitration decision if he first proves he is a victim of unfair representation. *See e.g., Anderson v. Northfork & Western States Ry. Co.,* 773 F.2d 880, 882 (7th Cir. 1985) and *Vosch v. Warner Continental, Inc.,* 734 F.2d 149, 154 (3d Cir. 1984) ("[e]mployees may appeal an adverse decision under § 301 if they can show that their union breached its duty of fair representation.").

labor contract provides, as many do, that the processing of employee-employer disputes under the grievance-arbitration procedure is to be handled solely by the union, individual employees are required to follow the contract's commands; they cannot seek redress on their own. [Case citation omitted.] Instead, the individual's rights are protected by the union's duty of fair representation." *Freeman v. Local Union No. 135, Chauffeurs, etc.*, 746 F.2d 1316, 1321 (7th Cir. 1984). *In accord, Anderson, supra,* 773 F.2d at 882, where the Seventh Circuit, in declaring a group of employees seeking to vacate an arbitration award and enforce an earlier award lacked standing, stated:

> "In our opinion, plaintiffs do not have standing in this matter. Plaintiffs have cited no cases to us that allow persons not parties to the original proceeding to appeal the outcome of that proceeding. In analogous cases, courts have held that individual employees have no standing to challenge an arbitration proceeding for which the union and the employer were the sole parties", citing as examples, *Vosch, Andres* and *Acuff, supra.*

This result is consistent with how state courts, who possess concurrent jurisdiction under Section 301 to vacate/confirm arbitration awards, have treated the issue. *See e.g., Melander v. Hughes Aircraft Co.*, 194 Cal.App.3d 542, 239 Cal.Rptr. 592 (1987).

## CONCLUSION

For all the foregoing reasons, Local 911 respectfully submits this case presents a substantial federal question for this Court's review and the decision below conflicts with other circuit authority and, as a result, this Court should grant the petition for a writ of certiorari.

Dated: March 14, 1988

Respectfully submitted,

WOHLNER, KAPLON, PHILLIPS, VOGEL, SHELLEY & YOUNG

By: ROBERT D. VOGEL

*Attorneys for Petitioner California Teamsters Public, Professional and Medical Employees Union Local 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*

# APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ABRAHAM GHEBRESELASSIE,
*Plaintiff,*
v.
COLEMAN SECURITY SERVICE, et al.,
*Defendants.*

Case No. CV 85-4823 JMI (Px)

## ORDER DENYING MOTION FOR LIMITED STAY OF PROCEEDINGS, GRANTING MOTION TO VACATE ARBITRATION PROCEEDINGS, AND GRANTING MOTION FOR RECONSIDERATION

Filed: June 5, 1986

This matter came on regularly before the Honorable James M. Ideman, United States District Judge. After full consideration of the pleadings, papers, and documents on file in this case, the Court Denies Defendant Local 911's Motion for Limited Stay of Proceedings Pending Arbitration. The Court also Grants Defendant Local 911's Motion to Vacate Arbitration Proceedings, and Grants Defendants' Motion for Reconsideration.

In the Motion For Summary Judgment previously before the Court, the Court found that Arbitrator Chavez did not have jurisdiction to determine the issue of the breach of duty of fair representation once the arbitrator had determined that the matter was not timely grieved. Therefore, the issue can not be submitted before another arbitrator.

The Court also finds that the issue of timeliness itself was not properly before the Arbitrator because it was outside the scope of the submission agreement. An arbitrator's authority is circumscribed by the issues submitted to him. According to *Frederick Meiswinkel, Inc. v. Laborer's Union Local, 261,* 744 F.2d 1374, 1377 (9th Cir. 1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 1394, 84 L.Ed. 2d 783 (1985), an arbitrator can bind the parties only on those issues that they have agreed to submit to him. Here, the joint submission agreement stated: 1) Was Abraham Ghebreselassie terminated for just cause: and 2) If not, what is the appropriate remedy? Therefore, the Court reconsiders its "Statement of Uncontroverted Facts and Conclusions of Law" to the extent that the issue of timeliness should be considered a disputed issue of fact. The arbitrator's award is therefore vacated.

IT IS SO ORDERED.

DATED: June 5, 1986

/s/ JAMES M. IDEMAN
JAMES M. IDEMAN
United States District Judge

# APPENDIX B

Abraham GHEBRESELASSIE,
Plaintiff-Appellant,

v.

COLEMAN SECURITY SERVICE; Ronald Farwell; Herman Hendricks; Parking Concepts, Inc., Defendants-Appellees,

California Teamsters Public, Professional and Medical Employees Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Defendant-Counter-Claimant-Intervenor,

and

California Teamsters Public, Professional and Medical Employees Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Defendant-Cross-Claimant.

No. 86-6490.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 4, 1987.

Decided Oct. 7, 1987.

Discharged employee brought action against employer, union, and private investigators, following his discharge for alleged criminal conduct, of which he was subsequently acquitted, alleging defamation, invasion of privacy, malicious prosecution, intentional infliction of emotional distress, negligence, wrongful discharge, and breach of duty of fair representation. Action was removed to federal court. The United States District Court for the Central District of California, James M. Ideman, J.,

granted union's motion to vacate arbitration award, but denied union's motion for summary judgment on fair representation claim, and entered judgment in favor of employer and investigators, and employee appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) employee was not precluded from arguing that he alleged claim for breach of collective bargaining agreement under complete preemption doctrine; (2) claim for breach of collective bargaining agreement was not barred for failure to exhaust internal union remedies; (3) arbitrator's award finding that employee was not entitled to relief in grievance proceeding because grievance had not been timely filed was not beyond scope of arbitrator's authority; and (4) employee failed to establish he was entitled to relief on remaining state law claims.

Affirmed in part; reversed and remanded in part.

1. Labor Relations — 777

Discharged employee was not precluded from arguing that he alleged valid claim under Labor Management Relations Act for breach of collective bargaining agreement, pursuant to complete preemption doctrine, in response to employer's contention that state wrongful discharge claim was preempted by LMRA. Fed.Rules Civ. Proc.Rule 8(a)(2), (e)(1), 28 U.S.C.A.; Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; U.S.C.A. Const. Art. 6, cl. 2.

2. Labor Relations — 416.1

Employee's claim against employer for breach of collective bargaining agreement was not barred for employee's puported failure to exhaust internal union remedies; union constitution did not make complete relief available to employee, as employer alleged. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

3. Labor Relations — 759

Employee, who alleged his union breached its duty of fair representation, had standing, in action brought under Labor Management Relations Act, to contest order vacating arbitration award that was granted in response to his union's motion to vacate order. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

4. Labor Relations — 462

Arbitrator did not act beyond scope of his authority by basing his decision to deny relief to discharged employee on union's failure to file timely grievance, where parties asked arbitrator to determine whether employee had been discharged for "just cause," and, if not, to what relief employee was entitled.

5. Libel and Slander — 44(3), 51(4)

Under California law, any communications from employer to unemployment office were entitled to qualified privilege, with respect to employee's claim that employer defamed him by making false statements in reports to unemployment office, which employee could overcome only by showing actual malice. West's Ann.Cal. Civ.Code § 47, subd. 2.

6. Libel and Slander — 44(3), 51(4)

Reports by private investigators and employer concerning investigation of ticket manipulation by airport parking lot cashiers, which employee alleged defamed him, were made to person interested therein by one who was requested by person interested to give information, and, therefore, under California law, were subject to qualified privilege, which could be overcome by showing of actual malice. West's Ann.Cal. Civ.Code § 47, subd. 3.

7. Malicious Prosecution — 64(2)

Employee presented no evidence from which fact finder could reasonably infer that private investigators or employer lacked probable cause or acted with malice with respect to criminal charges brought against employee of which he was acquitted and, therefore, employee was not entitled to recover on malicious prosecution claims.

James L. Brown, Supkoff and Brown, Los Angeles, Cal., for plaintiff-appellant Ghebreselassie.

Robert Berchan, Booth, Mitchel, Strange & Smith, Los Angeles, Cal., for defendants-appellees Coleman Sec. Service, Ronald Farwell, and Herman Hendricks.

Elaine Holland, Los Angeles, Cal., for defendant-appellee Parking Concepts.

Robert D. Vogel, Los Angeles, Cal., for defendant-counter-claimant-intervenor California Teamsters Public, Professional and Medical Employees.

Appeal from the United States District Court for the Centeral District of California.

Before WALLACE, BEEZER and HALL, Circuit Judges.

WALLACE, Circuit Judge:

Ghebreselassie appeals the district court's order vacating an arbitration award and its order granting summary judgment in his action alleging breach of a collective bargaining agreement, wrongful termination, defamation, negligence, malicious prosecution, and intentional infliction of emotional distress. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse the order vacating the arbitration award and the summary judgment on Ghebreselassie's claim for breach of the collective bargaining agreement. We affirm the summary judgment with respect to Ghebreselassie's other claims.

I

The City of Los Angeles Department of Airports (department) entered into a contract to have Parking Concepts, Inc. (employer) operate its airport parking lots. The employer hired Ghebreselassie as a parking lot cashier at one of these airport parking lots. The employer entered into a collective bargaining agreement with the Teamsters Union Local 311 (union) which governed the terms and conditions of Ghebreselassie's employment.

The department hired Coleman Security Service, Inc. (investigators) to investigate the airport parking lot cashiers to determine whether any were engaging in theft through "ticket manipulation." The investigators used the following procedure. Two investigators in separate cars would exit an airport parking lot directly behind each other. The first investigator would present a "test ticket" to the cashier and pay the required parking fee. The test ticket would be several days old and require a large payment, therefore presenting a tempting target for manipulation by a cashier. The second investigator would present a "follow-up ticket" — an ordinary ticket obtained from the ticket dispensing machine. Both investi-

gators would record the serial numbers from the tickets, the amount of money paid, and a description of the cashier.

The parking lot gate arms would not open unless the cashier had placed the customer's ticket in the cash register when a validation number was imprinted on it. Therefore, if the cashier properly handled the two tickets, they would be stamped with sequential validation numbers. On the other hand, if the cashier substituted a small fee ticket for the large fee test ticket and pocketed the difference between the two fees, the test ticket would not appear. The cashiers were required to turn in all tickets and money collected during their shift. The department's auditor would complete the investigation by looking for the follow-up ticket and then looking for the test ticket which should be located immediately before the follow-up ticket.

The investigators performed this procedure on Ghebreselassie. The department's auditor determined that the "test ticket" was missing and provided this information to the investigators. The investigators then prepared a preliminary investigation report and presented it to the Los Angeles Police Department. The city prosecutor filed a criminal charge against Ghebreselassie. That same day, the employer terminated Ghebreselassie for alleged ticket manipulation. Ghebreselassie was acquitted of the criminal charge.

Ghebreselassie filed suit in California state court against the employer and the investigators (the company and two of its employees) alleging defamation, invasion of privacy, malicious prosecution, intentional infliction of emotional distress, negligence, and wrongful discharge. The union filed a grievance with the employer which proceeded to arbitration. The arbitrator found that Ghebreselassi was dismissed without just cause but de-

nied a remedy because the grievance had not been timely filed by the union. Ghebreselassie then amended his complaint adding the union as a defendant and alleging that the union breached its duty of fair representation in the handling of his grievance. The union removed the action to the federal district court.

The district court granted the union's motion to vacate the arbitration award, but denied the union's motion for summary judgment on the fair representation claim. The district court granted the motions for summary judgment brought by the employer and the investigators on the tort and wrongful discharge claims, and entered judgment in favor of those defendants pursuant to rule 54(b) of the Federal Rules of Civil Procedure. Ghebreselassie appeals the orders vacating the arbitration award and granting summary judgment with respect to all of his claims against the employer and the investigators except invasion of privacy. His claim against the union alleging breach of its duty of fair representation is still pending in the district court.

## II

[1] The district court granted the employer's summary judgment motion on Ghebreselassie's claim for wrongful discharge on the ground that it was preempted by section 301 of the Labor management Relations Act (LMRA), 29 U.S.C. § 185. Ghebreselassie does not dispute the court's conclusion that section 301 governs his wrongful discharge claim, but argues that the allegations in his complaint state a valid claim under section 301 and that summary judgment was therefore inappropriate.

Section 301 claims are founded on rights created by a collective bargaining agreement. *Caterpillar Inc. v. Williams*, ____ U.S. ____, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (*Caterpillar*); *Allis-Chalmers Corp. v. Lueck*, 471

U.S. 202, 210, 105 S.Ct. 1904, 1910, 85 L.Ed.2d 206 (1985). Where, as in the present case, a state law claim falls within the scope of section 301, it is subject to "complete preemption" — any claim purportedly based on the pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar,* 107 S.Ct. at 2430. Based on the complete preemption doctrine, Ghebreselassie contends that his wrongful discharge claim stated a valid claim under section 301.

The employer responds, however, that the complete preemption doctrine has only been applied at the request of a defendant who seeks to recharacterize a state law claim as one arising under federal law in order to remove a state court action to federal court. *See, e.g., Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968); *Fristoe v. Reynolds Metals Co.,* 615 F.2d 1209 (9th Cir. 1980). In this case, removal jurisdiction was based on the fair representation claim against the union, not on the theory that Ghebreselassie's wrongful termination claim arose under section 301. Therefore, the employer argues, because Ghebreselassie framed his wrongful termination claim under state law and because none of the defendants have moved to recharacterize it as a federal law claim, it must be considered as framing only a state law claim. The employer then concludes that because the state law claim is preempted, Ghebreselassie is not left with any properly pleaded claim based on his alleged termination without just cause.

The employer's argument, although plausible, is flawed in two respects. First, preemption is a doctrine derived from the supremacy clause of the Constitution which bars states from enacting laws that interfere with federal law. *See In re Cement and Concrete Antitrust Litigation,* 817 F.2d 1435, 144 (9th Cir. 1987). Although section 301 of

the LMRA may preempt or nullify certain aspects of state law, it does not cause any factual allegations in a complaint to disappear. After a court has determined that a certain state law is preempted, a separate question may remain as to whether the complaint's factual allegations state a claim under federal law or under non-preempted state law. Therefore, although section 301 preempts California's wrongful discharge law as applied to Ghebreselassie's complaint, it does not preempt Ghebreselassie's allegations.

Second, a properly pleaded claim in federal court need not specify under which law it arises. A complaint need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "No technical forms of pleading . . . are required." *Id.* rule 8(e)(1). For example, a claim for negligence under the Federal Employers' Liability Act does not need to mention that Act or even that the claim is intended to arise under federal rather than state law. *See id.* rule 84 appendix, form 14. A plaintiff who desires to invoke a district court's federal question jurisdiction may have to allege that a claim arises under federal law to satisfy the requirement that the complaint contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." *Id.* rule 8(a)(1). But such a statement is not needed where, as in this case, "the court already has [federal question] jurisdiction and the claim needs no new grounds of jurisdiction to support it." *Id.* Therefore, Ghebreselassie is not precluded from arguing that he alleged a section 301 claim even though he failed to mention that section in his complaint.

If a complaint does not declare the legal theories upon which a plaintiff relies, a defendant can require a plaintiff to identify these theories through discovery, a motion attacking the pleadings, a motion for summary judgment,

or at a pretrial conference. The choice-of-law issue for Ghebreselassie's termination claim arose for the first time when the employer moved for summary judgment on the ground that state law was preempted. In response, Ghebreselassie argued that summary judgment was inappropriate because he had stated a valid section 301 claim. Therefore, we do not face a situation where a plaintiff has misled a defendant as to the nature of his claim in his responses to discovery or his arguments regarding pretrial motions. Ghebreselassie contended from the moment the question first arose that he had framed a valid federal law claim. The employer does not argue that summary judgment was appropriate on the merits of Ghebreselassie's section 301 claim. Therefore, we conclude that Ghebreselassie has stated a valid section 301 claim and we reverse summary judgment with respect to this claim.

## III

[2] Even if summary judgment is not appropriate on the merits of Ghebreselassie's section 301 claim, the employer argues that we should affirm summary judgment on the ground that the claim is barred for failure to exhaust internal union remedies. Both Ghebreselassie and the employer agree that his action for breach of the collective bargaining agreement is barred if internal union appeals procedures could have afforded "either complete relief to [Ghebreselassie] or reactivation of his grievance" against the employer. *Clayton v. International Union,* 451 U.S. 679, 692, 101 S.Ct. 2088, 2097, 68 L.Ed.2d 538 (1981); *accord Scoggins v. Boeing Co., Inc.,* 742 F.2d 1225, 1220 (9th Cir. 1984). The employer does not contend that the internal union appeals procedure would have resulted in the reactivation of Ghebreselassie's grievance against the employer. The employer does claim,

however, that Ghebreselassie could have obtained the full relief he sought — monetary damages.

The employer points to a provision in the union's constitution, which allegedly provides such relief. Article XIX, section 9(a) states that

> [d]ecisions and penalties imposed upon individual members, officers, elected Business Agents, Local Unions . . . found guilty of charges may consist of reprimands, fines, suspensions, expulsions, revocations, denial to hold any office permanently or for a fixed period, or commands to do or perform, or refrain from doing or performing, specified acts . . . If the fine is against a member or officer of a Local Union . . . it shall be paid into the treasury of the Local Union.

This section does provide for a monetary sanction — a "fine" — but the money is not awarded to an aggrieved union member to recompense the damges he has suffered. The employer does not point to any other evidence in the record that would support its contention that monetary damages would be awarded Ghebreselassie if he prevailed in his internal union appeals.

The employer argues, however, that its interpretation of the union's constitution is supported by *Tinsley v. United Parcel Service, Inc.*, 665 F.2d 778 (7th Cir. 1981). That decision affirmed a summary judgment granted against an employee who had failed to exhaust remedies provided by the International Brotherhood of Teamsters, the same international union present in this case. *Id.* at 780. The conclusion implicit in the decision is that monetary damages were available under the Teamster's constitution. *Id.* Nevertheless, the opinion nowhere explicitly states that such damages are available, nor does it offer any support for its implicit conclusion. Although we have great respect

for opinions of a sister court, we are unpersuaded that this case is authority that damages are available under the constitution involved in the action before us. The union's constitution which is before us does not on its face provide for damages for an aggrieved member, and the employer has not pointed to any other evidence that suggests that Ghebreselassie could have obtained the monetary relief he seeks by pursuing internal union appeals procedures. We therefore conclude that summary judgment is not appropriate on the ground that Ghebreselassie failed to exhaust internal union remedies. *Cf. Winter v. Local Union No. 639*, 569 F.2d 146, 149 (D.C. Cir. 1977) (observing in dicta that a member of the Teamsters "probably could not have obtained money damages through union disciplinary channels").

## IV

Ghebreselassie appeals the district court's order vacating the arbitration award. The union argues that the order vacating the award should be upheld because Ghebreselassie lacks standing to appeal this issue and because the arbitrator decided an issue not submitted to him by the parties.

### A.

[3] We first address the union's suggestion that a plaintiff in an action brought under section 301 lacks standing to contest an order vacating an arbitration award that was granted in response to his union's motion to vacate the order. We have recognized that an employee who alleges that his union breached its duty of fair representation has standing in federal court to litigate the propriety of an arbitration award in an action brought under section 301. *Andrus v. Convoy Co.*, 480 F.2d 604, 606 (9th Cir.), *cert. denied*, 414 U.S. 989, 94 S.Ct. 286, 38

L.Ed.2d 228 (1973); *see also Freeman v. Local Union No. 135, Chauffeurs,* 746 F.2d 1316, 1321 (7th Cir. 1984) (An individual employee may bring a section 301 action to seek judicial review of an arbitrator's award as long as he exhausts the contract's grievance procedures and alleges that the union breached its duty of fair representation during the arbitral process.); *Vosch v. Werner Continental, Inc.,* 734 F.2d 149, 154 (3d Cir. 1984) (Employees who allege a breach of the duty of fair representation may appeal an arbitration decision under section 301 if the grievance procedure was "substantially inadequate."), *cert. denied,* 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed.2d 779 (1985); *Harris v. Chemical Leaman Tank Lines, Inc.,* 437 F.2d 167, 171 (5th Cir. 1971) (same).

The fact that an individual employee could not have demanded that his union arbitrate his grievance under the contract does not determine whether he can appeal an order vacating an award in his favor. This is especially true where, as here, the employee was a named party in the proceeding below. *See F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781,* 629 F.2d 1204, 1211-12 (7th Cir. 1980), *cert. denied,* 451 U.S. 937, 101 S.Ct. 2016, 68 L.Ed.2d 324 (1981).

The union has not cited any case or other authority to support its assertion that an employee in a section 301 action lacks standing to appeal an order vacating an arbitration award. Indeed, the union concedes that employees who allege a breach of the duty of fair representation are not barred from seeking an appeal of an arbitration decision. We see no reason to depart from this rule in this case.

B.

[4] The union argues that the order vacating the award was proper because the arbitrator acted beyond the

scope of his authority by basing his decision to deny relief to Ghebreselassie on the union's failure to file timely the grievance. The union contends that the only issue that the union and the employer submitted to the arbitrator was the contractual propriety of Ghebreselassie's termination from employment, and that the question of timeliness therefore was not within the scope of the submission agreement.

It is firmly established, however, that a court should not reverse an arbitration award if it is based on a plausible construction of the collective bargaining agreement. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1352-53, 4 L.Ed.2d 1409 (1960) (*Warrior & Gulf*); *Edward Hines Lumber Co. v. Lumber and Sawmill Workers Local No. 2588*, 764 F.2d 631, 634 (9th Cir. 1985), *cert. denied*, 475 U.S. 1131, 106 S.Ct. 1661, 90 L.Ed.2d 203 (1986). Where a particular issue appears to lie outside the scope of the parties' agreement to submit disputes to arbitration, a federal court must defer to the arbitrator's resolution of the dispute unless the parties' arbitration agreement "is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, 363 U.S. at 582-83, 80 S.Ct. at 1352-53 (1960).

In the present case, the parties asked the arbitrator to determine two questions: whether Ghebreselassie had been discharged for "just cause," and, if not, to what relief he was entitled. The arbitrator decided that Ghebreselassie had not been discharged for just cause. He then decided that Ghebreselassie was not entitled to relief because the grievance had not been timely filed. The union nevertheless argues that the decision to deny the grievance was improper because the parties had not mentioned the timeliness issue in their submission statement.

The union's argument that the arbitrator acted improperly in denying the grievance is unconvincing. In deciding that Ghebreselassie was not entitled to relief, the arbitrator decided an issue specifically submitted to him by the parties. His decision does not conflict with a provision in the collective bargaining agreement, but rests explicitly on his construction of its provisions.

The district court did not find that the arbitrator's decision regarding the timeliness issue conflicted with any provision of the collective bargaining agreement. For this reason, the case relied on by the district court in reaching its decision, *Frederick Meiswinkel, Inc. v. Laborer's Union Local 261,* 744 F.2d 1374 (9th Cir. 1984), *cert. denied,* 470 U.S. 1028, 105 S.Ct. 1394, 84 L.Ed.2d 783 (1985), is inapposite. In that case, an arbitrator decided a jurisdictional dispute between two unions in the face of a provision in the collective bargaining agreement specifically stating that jurisdictional disputes were not arbitrable. We held that "[a]n award that conflicts directly with the contract cannot be a 'plausible interpretation' " of it. *Id.* at 1377. In the present case, in contrast, the arbitrator's decision to deny relief rests directly on his construction of the parties' submission agreement and on his interpretation of the collective bargaining agreement. We cannot say that the arbitrator's decision to deny the grievance on timeliness grounds was improper where, as here, both parties argued this issue before the arbitrator and neither objected to the introduction of evidence bearing on this issue.

We hold, therefore, that the district court erred in setting aside an arbitration award that was based upon a reasonable construction of the parties' arbitration agreement. For that reason, we reverse the order vacating the award.

V

The district court granted summary judgment on Ghebreselassie's negligence claim against the investigators and the employer on two grounds: (1) the investigators and the employer did not owe Ghebreselassie a duty of reasonable care, and (2) if the investigators and the employer did have a duty, they did not breach it. In the district court, Ghebreselassie did not argue that the investigators and the employer owed him a duty, nor did Ghebreselassie point to any evidence from which one could infer that the investigators or the employer breached a duty of care. Ghebreselassie merely declared, without support, that his negligence claim raised disputed issues of fact. Because Ghebreselassie did not sustain his burden of coming forward with evidence to support his allegations, summary judgment was proper. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

VI

[5, 6] We conclude that the district court properly granted summary judgment on Ghebreselassie's remaining state law claims. Ghebreselassie contends that the employer defamed him by making false statements in its "termination report" and in its written report to the state unemployment office and that the investigators' reports defamed him. Any communications to the unemployment office are entitled to a qualified privilege. *See* Cal.Civ.Code § 47(2); *William v. Taylor,* 129 Cal.App.3d 745, 754, 181 Cal.Rptr. 423 (1982). The other reports by the investigators and the employer are also qualifiedly privileged because they were made "to a person interested therein . . . by one . . . who is requested by the person interested to give the information." Cal.Civ.Code § 47(3) (West 1982). Ghebreselassie may defeat the qual-

ified privilege by showing " 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will . . . *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication." *Roemer v. Retail Credit Co.*, 44 Cal.App.3d 926, 936, 119 Cal.Rptr. 82 (1975) (emphasis in original). Because Ghebreselassie fails to point to any evidence that would support such a showing, summary judgment was appropriate. Moreover, Ghebreselassie's defamation claim was the basis for his intentional infliction of emotional distress claim and therefore, summary judgment was also appropriate on that claim. *See Lerette v. Dean Witter Organization, Inc.*, 60 Cal.App.3d 573, 579, 131 Cal.Rptr. 592 (1986).

[7] Finally, Ghebreselassie contends that the district court erred in granting summary judgment to the investigators and the employer on his malicious prosecution claims. "Malicious prosecution 'consists of initiating or procuring the arrest and prosecution of another under *lawful process*, but from *malicious motives* and *without probable cause*. . . .' " *Sullivan v. County of Los Angeles*, 12 Cal.3d 710, 720, 117 Cal.Rptr. 241, 527 P.2d 865 (1974) (emphasis in original), *quoting* 4 Witkin, *Summary of California Law*, Torts § 242 at 2522-23 (8th ed. 1974). Ghebreselassie points to no evidence from which a fact-finder could reasonably infer that the investigators or the employer lacked probable cause or that they acted with malice. Summary judgment was appropriate.

## VII

We conclude that Ghebreselassie's wrongful termination claim stated a valid section 301 claim against his employer. We therefore reverse the summary judgment with respect to that claim and remand for further pro ceedings. We conclude that the district court erred in vacating the arbitration award and therefore reverse the order vacating the award. We affirm the summary judgment with respect to Ghebreselassie's other claims against the employer and the investigators.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 14, 1988, I served the within Petition for Writ of Certiorari in re: "California Teamsters Public vs. Abraham Ghebreselassie" in the United States Supreme Court, October Term 1987, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

James L. Brown, Esq.
Supkoff and Brown
6380 Wilshire Boulevard
Suite 1507
Los Angeles, California 90048

Elaine Holland, Esq.
Paul, Hastings, Janofsky & Walker
555 S. Flower Street
22nd Floor
Los Angeles, California 90071

All Parties to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on March 14, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

(2)



No. 87-1547

In The

# Supreme Court of the United States

October Term, 1987

CALIFORNIA TEAMSTERS PUBLIC, PROFESSIONAL AND MEDICAL EMPLOYEES UNION LOCAL 911, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

vs. *Petitioner,*

ABRAHAM GHEBRESELASSIE,

*Respondent.*

## BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**James L. Brown, Esq.**
Supkoff and Brown
Attorneys at Law
6300 Wilshire Boulevard, Suite 1540
Los Angeles, California 90048

Telephone: (213) 651-2521

*Attorneys for Respondent*
Abraham Ghebreselassie

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 pp

TABLE OF CONTENTS

## TABLE OF AUTHORITIES CITED

Page

### CASES



### STATUTES



### OTHER

## 1. THIS MATTER SHOULD NOT BE REVIEWED BY THIS COURT

### A. PROPERLY FRAMED, THE ISSUE INVOLVED IN THIS CASE IS MUCH NARROWER THAN FRAMED IN THE BRIEF OF THE PETITIONER AND DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION FOR THIS COURT'S REVIEW

The Petitioner-union ["Local 911" herein] states, in its petition to this Court, that the question presented is whether an employee-union member possesses standing to "vacate/confirm" an arbitration award, contrary to the position of his exclusive collective bargaining representative, in the absence of a finding of unfair representation [Pp. i, 5, Petition]. However, the Respondent-employee ["Ghebreselassie" herein] certainly did not seek to "vacate" the award in this case. Moreover, he did not directly seek to "confirm" the award, but rather appealed from an order vacating same. In view of those facts, and to that extent, at least, the issue has not been accurately framed by Local 911.

The issue in this case, properly framed, is:

> Whether a plaintiff/union member, in his action against his employer for wrongful discharge, under Section 301 (*Labor Management Relations Act*, Section 301(a) [29 U.S.C., Sec. 185(a)]), and against his union alleging breach of the duty of fair representation ["DFR" herein] for failure to file a timely grievance on his behalf, has standing to appeal an order, made pursuant to his union's motion in said action, vacating an arbitration award which determined that plaintiff was discharged without just cause and that the grievance was not timely filed

by the union, findings favorable to the employee in the context of said action.

Significantly, Ghebreselassie actively participated in the arbitration proceeding, and is the plaintiff in the "hybrid" Section 301 Wrongful Discharge/Breach of the DFR, district court action. Local 911 filed a Cross-Claim in said action to vacate the arbitration award. Thereafter, during the litigation and, over the objection of Ghebreselassie, Local 911 made a motion to set the award aside. The trial court granted the motion. Plaintiff appealed from that order and from other adverse trial court rulings.

The Court of Appeals of the Ninth Circuit ["C.A." herein] reversed the trial court order vacating the arbitration award, which contained a determination that Ghebreselassie had been discharged without just cause, in violation of the applicable collective bargaining agreement, and that the grievance was not timely filed by his union, findings arguably favorable to Ghebreselassie in the context of his district court action. Since the two primary elements of proof, in Ghebreselassie's district court action against the employer and Local 911, are (1) that he was discharged without just cause in violation of the applicable collective bargaining agreement, and (2) that his union breached the DFR, the findings contained in the arbitration award were favorable to Ghebreselassie in the context of said action, even though the ultimate result of the award was to deny him a remedy because the grievance was untimely.

Clearly, Ghebreselassie did not vacate or attempt to vacate the award, as suggested by Local 911 in its

brief. Moreover, he did not directly attempt to confirm the award, but rather simply appealed from an order vacating same. On appeal, relying on well established precedent regarding the finality of arbitration awards, Ghebreselassie argued that the award was improperly set aside because the award was well within the scope of the submission to the arbitrator by the parties, was based on a plausible interpretation and construction of the collective- bargaining agreement, and thus, should be final and binding based on well established principles of federal labor law. In agreeing with Ghebreselassie's position, and reversing the order vacating the arbitration award, the C.A. did not depart from established law but rather followed it. With respect to the "standing" issue, the Court of Appeals correctly observed that:

> "The fact that an individual employee could not have demanded that his union arbitrate his grievance under the contract does not determine whether he can *appeal an order vacating an award in his favor*. This is especially true where, as *here, the employee was named a party in the proceeding below*. (citation omitted)
>
> The union has not cited any case or other authority to support its assertion that an employee in a section 301 action lacks standing *to appeal an order vacating an arbitration award*."
>
> *Ghebreselassie v. Coleman Security Service*, supra, 829 F.2d at 897. Emphasis added.

Local 911 argues that, based on the C.A. decision, a mere allegation of breach of the union's DFR "will cloak an employee with power to directly vacate/confirm an

adverse arbitration decision" [P. 7, Petition]. It is submitted that the decision of the C.A. in this case neither suggests nor stands for such a broad or sweeping proposition, and, since Ghebreselassie is not attempting to, either vacate, or directly confirm the award, the issue of whether an employee can "vacate/confirm" an arbitration award, absent a finding of breach of the union's DFR is not raised by the particular facts involved in this case.

This Court need not consider whether Ghebreselassie must *prove*, rather than simply *allege* that Local 911 breached the DFR as a prerequisite to attacking the arbitration award, because the facts of this case do not involve, as do the numerous cases relied on by Local 911, an employee's attempt to vacate an arbitrator's award. Thus, Local 911's argument that the C.A. decision has "seriously eroded" the finality effect that must be given to arbitration awards [P. 7, Petition] is not well placed in that the C.A., at Ghebreselassie's urging, upheld the award.

Although Local 911 submits that an employee "must rely upon the union to represent his interests and properly exhaust his contractual remedies on his behalf" [P. 6, Petition], Ghebreselassie could no longer reasonably rely on Local 911 to protect his interests at the point in time that he appealed the order vacating the arbitration award. In fact, once Ghebreselassie had filed suit alleging a breach of the DFR, relying in part on the findings of the arbitrator, the interests of Ghebreselassie and Local 911 were clearly adverse and conflicting, and the rationale of the protection afforded by the union's DFR no longer applied. See *Freeman v.*

*Local Union No. 135, Chauffeurs, Etc.*, 746 F.2d 1316 (7th Cir. 1984).

In the case of *Freeman v. Local Union No. 135, Chauffeurs, Etc.*, supra, 746 F.2d 1316, 1321-1322, the court, in holding that a union's DFR does not extend to its decision to vacate an arbitration award, observed that once the arbitrator denied plaintiff's grievance, the rationale for the DFR "evaporated", and concluded that the union member no longer needed the "protection" afforded by the DFR because he then had access to extra-contractual remedies. The court further noted that:

> "That being the case, the union owed plaintiff no duty in deciding whether to seek judicial review of the committee's ruling because, with respect to that decision, it was not acting as his exclusive representative. The union was under no duty to provide Freeman with more legal assistance than bargained for in the contract or required by law".

Similarly, it is submitted that in this case, the conflicting positions of Local 911 and Ghebreselassie occurred at a point in time after the protection afforded by the DFR had "evaporated", and Ghebreselassie was properly permitted to appeal the order vacating the arbitration award.

Under Rule 17 of this Court, outlining the factors which should be considered by this Court in determining whether to exercise its discretion to grant a petition for writ of certiorari, the challenged decision should either conflict with the decision of another decision of this court or with a federal court of appeals or state court of last resort, on the same matter; or, should

decide an important question of federal law which has not been, but should be settled by this Court. It is respectfully submitted that neither of said factors exist in this case.

## B. THE NINTH CIRCUIT DECISION IN THIS CASE DOES NOT DEPART FROM WELL ESTABLISHED EXISTING FEDERAL LABOR LAW AND DOES NOT DIRECTLY CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

The petition herein incorrectly states that this case is "the first appellate court decision announcing an employee possesses standing to independently and directly vacate/confirm an arbitration award". Significantly, (1) Ghebreselassie did not *vacate* or attempt to vacate the award; and, (2) Ghebreselassie did not directly confirm the award. Rather, Local 911 was the party vacating the award and Ghebreselassie simply appealed the order vacating the award. Accurately framed, the C.A. holding in this case does not conflict with either of the cases cited by Local 911.

The case of *Acuff v. United Paper Makers and Paper Workers*, 404 F.2d 169 (5th Cir. 1968), cert. denied, 394 U.S. 987, 89 S.Ct. 1466, 22 L.Ed. 762 (1969), cited by Local 911, as conflicting with the decision in this case, involved an attempt by employees whose grievances had been denied, to *intervene* in an action brought by the union under Section 301 of the *LMRA*, in an attempt *to vacate* the adverse arbitration award. The court denied the motion to intervene. This

case is readily distinguishable from the *Acuff* case in that here, (1) Ghebreselassie was not attempting to vacate the arbitration award but instead was simply appealing from an order vacating the award; and (2) Ghebreselassie was not attempting to intervene in a pending action between his union and the employer but was actually the plaintiff in the action.

In the case of *F. W. Woolworth Co. v Miscellaneous Warehousemen's Union, Local No. 781*, 629 F.2d 1204 (7th Cir. 1980), cert. denied, 451 U.S. 937, 101 S.Ct. 2016, 68 L.Ed.2d 324 (1981), cited by Local 911, as conflicting with the decision in this case, the court concluded that employee-union members *did have standing* to intervene and appeal in an action brought by the employer to vacate an arbitration award favorable to the employees, where the union did not seek appellate review of the trial court order vacating the arbitration award. Neither this case, nor the *Woolworth* case involves an attempt to *vacate* or attack an arbitration award. Moreover, the *Woolworth* case actually permitted the employees to intervene in an action to uphold an award favorable to them.

It is submitted that the decision of the C.A. in this case is not in conflict with the decision of the Seventh Circuit in the *Woolworth* case to any extent. In fact, the C.A. in this case cited the *Woolworth* case in support of its holding. See *Ghebreselassie v. Coleman Security Service*, supra, 829 F.2d 892 at 897.

In the case of *Freeman v. Local Union No. 135, Chauffeurs, Etc.*, supra, 746 F.2d 1316, 1321, cited by Local 911 in its Petition, the court noted that the union

member had the right to file suit to vacate the committee's decision "as long as he exhausted the contract's grievance procedure and *alleged* that Local 135 breached its DFR" during the arbitration process.

The case of *Andrus v. Convey Co.*, 480 F.2d 604, 606 (9th Cir. 1973), cited by Local 911, is likewise readily distinguishable from this case, because it involved an action by union members seeking to *overturn* an arbitration decision. The court simply concluded that an employee could not *attack* the arbitration decision except on the grounds of fraud, deceit or breach of the DFR, or unless the grievance procedure was "a sham, substantially inadequate, or substantially unavailable". The *Andrus* case was cited by the C.A. in this case in noting that, an employee who alleges that his union breached the DFR "has standing to litigate the propriety of an arbitration award in an action brought under Section 301". *Ghebreselassie v. Coleman Security Service*, supra, 829 F.2d at 897. See also *Vosch v. Werner Continental, Inc.*, 734 F.2d 149, 154 (3d Cir. 1984), cert. denied, 469 U.S. 1108, 105 S.Ct. 784, 83 L.Ed. 779 (1985).

The case of *Anderson v. Norfolk & Western Railway Co.*, 773 F.2d 880, 882 (7th Cir. 1985), cited by Local 911, is also clearly distinguishable from this case. There, the court held that employees had no standing to sue to *vacate* an arbitration award, where they had not participated in the arbitration proceeding, had been represented by their union and where they did not "allege" fraud, deceit or breach of the DFR.

## 2. CONCLUSION

For all of the reasons discussed herein, it is respectfully submitted that this Court should not grant the petition for writ of certiorari to review the decision of the Court of Appeals of the Ninth Circuit in this matter.

DATED: June 6, 1988

Respectfully Submitted

SUPKOFF & BROWN

By: JAMES L. BROWN
*Attorneys for Respondent*
Abraham Ghebreselassie